IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-21865-CIV-GOLD/MCALILEY

ABC CHARTERS, INC., et al.,

Plaintiffs,

v.

CHARLES H. BRONSON, in his official capacity as Commissioner of the Florida Department of Agriculture and Consumer Services,

Defendant.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Pursuant to 28 U.S.C. § 517, the United States of America respectfully submits this statement to attend to the interests of the United States concerning recent amendments to the Florida Sellers of Travel Act.

The United States Constitution vests exclusive authority for the conduct of foreign relations in a single, national government. This structure ensures that the United States is able to speak with one voice when managing relations with other nations. Pursuant to its constitutional authority, Congress has enacted numerous federal statutes pertaining to relations with the countries that the Executive Branch designates as state sponsors of terrorism ("designated states"). Some of these federal statutes mandate aspects of the sanctions imposed on the designated states, while others give the Executive Branch broad authority and flexible tools to regulate transactions with these countries. Congress specifically has addressed travel to the designated states under current sanctions regimes. With regard to Cuba, Congress has passed

several laws governing permitted travel, while leaving the Executive Branch discretion to adjust many aspects of the travel regulations as circumstances dictate. For the other designated states, Congress has taken the view that travel to these countries generally should be unencumbered. The Executive Branch has in turn promulgated comprehensive regulations governing, *inter alia*, commerce with designated states and travel to Cuba. These regulations are designed to balance multiple, competing foreign policy considerations and achieve important, often changing, foreign policy objectives.

The recently-enacted amendments to the Florida Sellers of Travel Act ("Florida Amendments") would interfere with this carefully-crafted federal scheme in a number of ways. The Florida Amendments go beyond federal law and current Executive Branch policy with respect to restrictions on transactions with designated states. They impose significant bonding and disclosure requirements, beyond those already imposed by the federal government, on sellers of travel to designated states. Florida's burdensome bonding and disclosure requirements will have the effect of limiting travel to designated states that the federal government has deemed consistent with U.S. foreign policy interests. The Florida Amendments also create penalties for violations of federal law that go above and beyond the federal government's own remedial scheme. Florida's own enforcement of federal laws and regulations will undermine federal government determinations about the appropriate penalties to apply to best achieve U.S. foreign policy objectives. The Florida Amendments also interfere with the federal government's ability to speak for the United States with one voice in foreign affairs. For these reasons, the Florida Amendments are preempted by federal law, the foreign affairs power, and the Foreign Commerce Clause.

The Florida Amendments are also preempted expressly by the Airline Deregulation Act ("ADA") insofar as they regulate public charter operators. Public charter operators are indirect air carriers, and the ADA expressly preempts state laws that have a connection with or effect on the rates, routes, or services of an indirect air carrier. The increased bonding and disclosure requirements, and the severe civil, administrative, and criminal penalties, provided for in the Florida Amendments will likely have such an effect, *i.e.*, they will result in the provision of fewer air carrier services to Cuba at higher rates. Accordingly, they are preempted.

BACKGROUND

I. FEDERAL LAW

A. Designation As A State Sponsor Of Terrorism

Countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism are designated pursuant to three laws: section 40 of the Arms Export Control Act, 22 U.S.C. § 2780; section 620A of the Foreign Assistance Act, 22 U.S.C. § 2371; and section 6(j) of the Export Administration Act, 50 U.S.C. App. 2405(j).[1] The Department of State ("DOS") commonly refers to countries designated under these provisions as "state sponsors of terrorism." Four countries are currently designated by DOS as state sponsors of terrorism: Cuba, Iran, Syria, and Sudan. *See* State Sponsors of Terrorism, at http://www.state.gov/s/ct/c14151.htm (last visited Mar. 18, 2009).[2]

---

[1] Although the Export Administration Act has lapsed, it has been continued in effect, to the extent permitted by law, by Executive Order 13222 (Aug. 17, 2001), which was issued pursuant to the President's International Emergency Economic Powers Act ("IEEPA") authorities.

[2] At the time the Florida Amendments were enacted in the summer of 2008, a fifth (continued...)

The designation of these countries as state sponsors of terrorism furthers important U.S. foreign policy interests and objectives. The designation triggers multiple restrictions under various statutes. For example, the Arms Export Control Act, the Foreign Assistance Act, and the Export Administration Act impose a ban on defense exports and sales, restrictions on U.S. foreign assistance, and controls over exports of dual use items. *See* 22 U.S.C. § 2780; *id*. § 2371; 50 U.S.C. App. 2405(j). Numerous other federal statutes impose additional restrictions. *See, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (providing a "terrorism exception" to the jurisdictional immunity of state sponsors of terrorism); Immigration and Nationality Act, 8 U.S.C. § 1202(h)(2)(D) (providing heightened requirements for in-person interviews with consular officers for aliens who are nationals of designated states).

These restrictions are implemented and enforced through a complex array of regulations, administered by numerous federal agencies. For example, the sanctions imposed under the Export Administration Act are implemented through the Export Administration Regulations, 15 C.F.R. pts. 730–774, and enforced primarily by the Bureau of Industry and Security in the U.S. Department of Commerce. *See* 15 C.F.R. §§ 730.1, 730.4; 15 C.F.R. pt. 730, Supplement No. 3; *see also* 15 C.F.R. § 764.3 (authorizing administrative sanctions for violations of the Export Administration Regulations). Although federal law imposes additional requirements on the issuance of visas to nationals of designated countries, no restrictions on transactions incidental to

---

[2](...continued)
country, North Korea, was also included on DOS's list of state sponsors of terrorism. The Secretary of State removed North Korea (the Democratic People's Republic of Korea) from the list on October 11, 2008. *See* U.S.-DPRK Agreement on Denuclearization Verification Measures.

travel are triggered by the state sponsor of terrorism designation. As discussed below, however, other federal statutes and regulations specifically address travel to designated states.

B. Specific Statutes and Regulations

In addition to the restrictions automatically triggered by the state sponsor of terrorism designation, transactions involving each of the four currently designated states (Cuba, Iran, Syria, and Sudan) are subject to additional restrictions under federal law. Some of these restrictions have been imposed pursuant to country-specific statutes. Others have been imposed by the President, using broad authority delegated by Congress under the Trading With the Enemy Act ("TWEA"), codified as amended at 50 U.S.C. App. §§ 1-44, the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-06, and other authorities. *See, e.g.*, Foreign Assistance Act, 22 U.S.C. § 2370(a) (authorizing the President to impose an embargo on Cuba). These restrictions, which reflect individualized foreign policy objectives for each state sponsor of terrorism, are implemented primarily through regulations administered by the Office of Foreign Assets Control ("OFAC") in the U.S. Department of the Treasury.

1. TWEA and IEEPA

The TWEA was enacted in 1917 to give the President the power to restrict trade with foreign countries and foreign nationals and to control certain property transactions during times of war and national emergencies. *See* Pub. L. No. 65-91, 40 Stat. 411 (1917). In 1977, Congress limited new sanctions under the TWEA to times of war and enacted IEEPA to replace the TWEA during times of peace. *See* Pub. L. No. 95-223, 91 Stat. 1625 (1977). At that time, the Executive Branch already had imposed sanctions on Cuba under the TWEA, and Congress permitted the

Cuba sanctions regime to continue under that authority.[3] IEEPA authorizes the President to declare a national emergency, to impose sanctions, and to take other steps "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a).

The TWEA and IEEPA provide the President with broad authority and flexible tools to regulate international economic transactions during times of war or national emergencies. *See Regan v. Wald*, 468 U.S. 222, 225–26, 228 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 672–74 (1981) (holding that, pursuant to IEEPA, the President had "broad authority" during the Iran hostage crisis to nullify court-ordered attachments against Iranian property in the United States). The President has utilized this authority to alternately tighten and loosen sanctions against particular foreign countries, nationals, and non-state actors, as necessitated by new international developments and changing foreign policy goals. This authority, however, is not unlimited. In a 1994 amendment to IEEPA, Congress carved out "transactions ordinarily incident to travel to or from any country" from the scope of activities that could be regulated by the President under IEEPA. 50 U.S.C. § 1704(b)(4).

---

[3] The 1977 amendments contained a "grandfather" clause that authorized the President to continue to exercise those powers delegated under the TWEA that were being exercised with respect to a country subject to sanctions as of July 1, 1977, as a result of a presidential declaration of national emergency. *See* Pub. L. No. 95-223, § 101(b), 91 Stat. 1625 (1977). To do so, the President must determine on an annual basis that the extension of sanctions with respect to a particular country "is in the national interest of the United States." *Id*. Since the 1977 amendments, presidents have consistently determined that the exercise of their authority under the TWEA with respect to Cuba is in the national interest of the United States. *See, e.g.*, Determination No. 2008-27, 73 Fed. Reg. 54055 (Sept. 12, 2008).

2. Cuba

The Executive Branch promulgated the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. pt. 515, under the authority of the TWEA and section 620(a) of the Foreign Assistance Act, 22 U.S.C. § 2370(a). One basic goal of the CACR has been "to isolate the Cuban government economically and deprive it of U.S. dollars." 69 Fed. Reg. 75468, 75468 (Dec. 17, 2004). The regulations also accommodate and promote a range of other foreign policy interests. To these ends, the CACR restrict, among other things, exports,[4] imports, property transactions, and transactions relating to travel to and from Cuba.[5] The CACR have been modified on numerous occasions over the years in response to both congressional legislation and Executive Branch determinations about how to best achieve U.S. foreign policy goals.

Congress has enacted several statutes to govern certain aspects of U.S. relations with Cuba. These statutes mandate some export controls and other sanctions, while leaving the Executive Branch discretion to adjust many aspects of the sanctions as circumstances dictate. In 1992, for example, Congress enacted the Cuban Democracy Act ("CDA"). The CDA, among other things, restricts trade with Cuba by foreign subsidiaries of U.S. firms and directs the President to encourage other countries to limit their trade with Cuba. 22 U.S.C. §§ 6003, 6005. The CDA also explicitly limits restrictions on U.S. exports of certain medicine and medical supplies to Cuba, but requires that exporters obtain a specific license for such items. *Id*. § 6004.

---

[4] The Department of Commerce also comprehensively regulates exports and reexports to Cuba through the Export Administration Regulations. *See* 15 C.F.R. § 746.2.

[5] The CACR apply to travel-related transactions rather than travel itself. *See* 31 C.F.R. § 515.201. Nevertheless, because receiving a benefit without paying for it constitutes a travel-related transaction, the practical effect is that the regulations impact travel. *See id*. § 515.420.

In 1996, Congress enacted the Cuban Liberty and Democratic Solidarity ("Libertad") Act. Among other things, the Libertad Act sets forth specific conditions that must be met by the Cuban Government before the President can lift the U.S. embargo against Cuba. 22 U.S.C. § 6064. Congress passed the Trade Sanctions Reform and Export Enhancement Act ("TSRA") in 2000. The TSRA, among other things, limits restrictions placed on the export of agricultural commodities, including food, to Cuba, 22 U.S.C. § 7205, and permits OFAC to license travel to Cuba related to the export of agricultural commodities, 22 U.S.C. § 7209. The TSRA also constrains OFAC from licensing any travel to Cuba for tourist activities while leaving unaffected existing regulations that permit the licensing of twelve categories of travel to Cuba. *See id*. Most recently, Congress enacted the Omnibus Appropriations Act, 2009, which contains several provisions affecting U.S. transactions with Cuba. *See* Pub. L. No. 111-8, §§ 620–22 (2009). Section 621, for example, prohibits OFAC from expending funds made available in the Act to administer, implement, or enforce the June 16, 2004 amendments to the CACR related to travel to visit immediate family members in Cuba. *Id*. § 621. OFAC already has implemented the new law by issuing a general license permitting an expanded range of family travel. General License for Visits to Close Relatives in Cuba, available at http://www.treas.gov/offices/enforcement/ofac/programs/cuba/gl_omni2009.pdf (last visited Mar. 18, 2009) (implementing the Omnibus Appropriations Act, 2009, by issuing a general license authorizing persons subject to U.S. jurisdiction to travel to Cuba to visit close relatives who are nationals of Cuba once every twelve months).

The CACR also have been modified over the years, pursuant to the President's authority under the TWEA, to adjust to new international developments and changing foreign policy goals.

The CACR's regulations involving travel to Cuba, for example, have been contracted and expanded on numerous occasions since the inception of the embargo on Cuba in 1962. *See, e.g.*, *Regan*, 468 U.S. at 225–30 (detailing amendments to the restrictions on travel to Cuba from 1963 to 1982); 59 Fed. Reg. 44884 (Aug. 30, 1994) (limiting remittances to Cuba and tightening travel restrictions to implement policy changes announced by the President); 60 Fed. Reg. 54194 (Oct. 20, 1995) (implementing policy changes announced by the President related to Cuba travel-related transactions, including adding a new authorization for certain educational exchanges); 64 Fed. Reg. 25808, 25809 (May 13, 1999) (expanding permitted remittances and people-to-people contact by amending restrictions on remittances and travel to Cuba in an effort "to expand the flow of humanitarian assistance to Cuba and strengthen independent civil society in that country"); 68 Fed. Reg. 14141 (Mar. 24, 2003) (expanding authorized travel to Cuba to visit family in response to a presidential initiative); 69 Fed. Reg. 33768 (June 16, 2004) (restricting authorized travel based on a report issued by the Commission for Assistance to a Free Cuba).

To promote a "peaceful transition to democracy" in Cuba, 68 Fed. Reg. 14141, 14143 (Mar. 24, 2008), the CACR currently permit travel to Cuba in certain instances that serve U.S. interests. They authorize certain travel by journalists, researchers, individuals with close relatives in Cuba,[6] U.S. government employees, and other persons licensed by OFAC. *See* 31

[6] In its order granting preliminary injunctive relief, the Court suggested that the then-applicable restrictions placed on travel to Cuba to visit immediate family members only apply to Cuban-Americans. *See* Order Granting Prelim. Inj., at 27–28, 39 (Oct. 10, 2008). In fact, however, the CACR authorize travel by any person subject to U.S. jurisdiction (not only Cuban-Americans) with close relatives who are nationals of Cuba. *See* General License for Visits to Close Relatives in Cuba, available at

(continued...)

C.F.R. §§ 515.561–.567.[7] Travel by individuals with close relatives in Cuba promotes U.S. interests in maintaining family ties and providing humanitarian relief to the Cuban people, in addition to helping promote democratic values. Travel by U.S. government employees is vital for operating the U.S. Interests Section in Havana, which maintains a channel for communications with the Cuban government, allows the federal government to monitor the situation in Cuba, maintains a large consular caseload, and performs a range of other functions typical for U.S. missions abroad.

Because travel to Cuba is so highly regulated by the federal government, the CACR require all travel service providers and carrier service providers that furnish services in connection with travel to Cuba to obtain authorization from OFAC before providing such services. *Id.* § 515.572(a). Travel service providers include, but are not limited to, "[t]ravel agents, ticket agents, commercial and noncommercial organizations that arrange travel to Cuba; tour operators; persons arranging through transportation to Cuba; persons chartering an aircraft or vessel on behalf of others in Cuba; and persons arranging hotel accommodations, ground transportation, local tours, and similar travel activities on behalf of others in Cuba." *Id.* § 515.572(a)(1). Travel and carrier service providers must comply with specific documentation and reporting requirements to maintain their licenses. *See id.* § 515.572. These requirements

---

[6](...continued)
http://www.treas.gov/offices/enforcement/ofac/programs/cuba/gl_omni2009.pdf (last visited Mar. 18, 2009); *see also* 31 C.F.R. § 515.302(a) (defining "national of Cuba" to include a subject or citizen of Cuba or a person domiciled in or a permanent resident of Cuba).

[7] U.S. Department of Homeland Security regulations further restrict travel to Cuba from the United States to three cities: Miami, New York, and Los Angeles. 19 C.F.R. § 122.153. Arrivals from Cuba are also restricted to these locations. *Id.*

permit monitoring and enforcement of the travel regulations. The requirements also mean that all direct travel between the United States and Cuba which is consistent with U.S. foreign policy is routed through licensed travel service providers and carrier service providers, and is dependent upon the continued viability of those entities.

A travel or carrier service provider that violates OFAC's licensing requirements (or anyone who violates any license, order, or regulation issued under the TWEA) is subject to civil and criminal penalties. *Id*. § 501.701. Civil penalties of not more than $65,000 per violation are assessed in OFAC's discretion. *See id*. § 501.701(a)(3). In determining whether to assess a penalty,[8] OFAC considers many factors to ensure that its actions will achieve U.S. foreign policy objectives. *See* 73 Fed. Reg. 51933, 51937–38 (Sept. 8, 2008) (setting forth the factors OFAC considers, including willfulness, voluntary self-disclosure, management involvement, and harm to sanctions program objectives).

3. Iran, Syria, and Sudan

Transactions and other commerce involving the other three countries currently designated as state sponsors of terrorism are also subject to congressional legislation, *see*, *e.g.*, Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344 (2006); Iran Freedom Support Act of 2006, Pub. L. No. 109-293, 120 Stat. 1344 (2006); Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, 117 Stat. 2482 (2003); Trade Sanctions Reform

[8] OFAC may forgo imposition of a penalty and instead issue a "cautionary letter" when it determines either that there is insufficient evidence to conclude a violation has occurred or that a finding of violation is not warranted under the circumstances. *See* 73 Fed. Reg. 51933, 51937 (Sept. 8, 2008). Alternatively, OFAC may issue a "finding of violation" when it determines a violation has occurred but the imposition of a civil monetary penalty is not the most appropriate enforcement response. *Id*.; *see also id*. at 51936–37 (describing other actions OFAC may take).

and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549 (2000) (as amended); Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) (as amended); Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, Title XVI (1992), Presidential Executive Orders issued pursuant to IEEPA or the statutes referenced above, *see, e.g.*, Executive Orders 12957, 12959, and 13059 (Iran); Executive Orders 13067, 13400, and 13412 (Sudan); Executive Orders 13338, 13399, and 13460 (Syria), and regulations promulgated by the Executive Branch to implement these laws, *see, e.g.*, Iranian Transactions Regulations, 31 C.F.R. pt. 560; Sudanese Sanctions Regulations, 31 C.F.R. pt. 538; Syrian Sanctions Regulations, 31 C.F.R. pt. 542; 15 C.F.R. §§ 746.7, 746.9 (regarding Iran and Syria, respectively). These statutes, Presidential orders, and regulations represent carefully calibrated decisions regarding U.S. foreign policy. Moreover, the regulations are subject to change without notice and comment to respond to the foreign situation.

Unlike the CACR, which regulates travel-related transactions, the regulations involving Iran, Syria, and Sudan expressly exempt "transactions ordinarily incident to travel to or from any country" from the scope of restricted activities. 31 C.F.R. §§ 560.210(d), 538.212(d), 542.206(c). This is because IEEPA, under which many of these regulations were promulgated, does not authorize the Executive Branch to regulate or prohibit transactions ordinarily incident to travel to or from any country. *See* 50 U.S.C. § 1702(b)(4) (as amended in 1994).

C. Federal Regulation Of Public Charter Operators

The U.S. Department of Transportation ("DOT") regulates public charter operators. Because there are no scheduled flights between the United States and Cuba, air transportation between the two countries is provided largely by public charter operators. After licensing by

OFAC, these public charter operators must receive approval in advance by DOT for each charter program they wish to operate. 14 C.F.R. § 380.25. Once approved, they are subject to extensive DOT regulations that address bonding, escrow arrangements, and the scope of permissible advertising. *See* 14 C.F.R. pt. 380.

The regulation of public charter operators by DOT is both broader and narrower than the regulation of travel and carrier service providers by OFAC. DOT's regulations are broader because they require prior approval of all public charter operators, not just those that provide transportation to and from Cuba.[9] DOT's regulations are narrower because they only apply to public charter operators whereas OFAC's regulations apply to public charter operators, ticket agents, travel agents, and others.[10]

II. THE PRESENT LITIGATION

A. Florida Sellers of Travel Act Amendments

On June 23, 2008, the State of Florida enacted Amendments to the Florida Sellers of Travel Act (the "Florida Amendments" or "Amendments"), 2008 Fla. Sess. Law Serv. Ch. 2008-214 (S.B. 1310), amending Florida Statutes, Chapter 559, Part XI. The Florida Amendments were to become effective July 1, 2008.

---

[9] Public charter operators providing services to and from Cuba nonetheless are subject to more searching review than other operators. Before DOT authorizes a public charter flight to or from Cuba, the flight prospectus must be reviewed and cleared by DOS and OFAC.

[10] DOT has authority to regulate ticket agents and travel agents, but it does not currently subject those entities to licensing or bonding requirements. They are, however, subject to deceptive practice and unfair methods of competition oversight by DOT. *See* 49 U.S.C. § 41712; 14 C.F.R. pts. 257, 258; 14 C.F.R. §§ 399.80, 399.84.

The Florida Sellers of Travel Act (the "Act") is Part XI of Chapter 559 of the Florida Statutes, a chapter regulating trade, commerce, and investment for companies doing business in Florida, *i.e.*, companies located in Florida or companies that sell to persons in Florida. Under the Act, a "seller of travel" — a person or company "who offers for sale, directly or indirectly, . . . prearranged travel, tourist-related services, or tour-guide services" — doing business in Florida must register annually with the Florida Department of Agriculture and Consumer Services ("FDACS") and abide by other regulations, such as securing a performance bond in favor of FDACS for the use and benefit of any traveler that is injured by the seller of travel.[11] Fl. Stat. §§ 559.927–.929.

The Florida Amendments create special provisions for sellers of travel who arrange reservations, flights, or certain other travel-related services for persons who travel from Florida to a "terrorist state." The Amendments define "terrorist state" as "any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism." *Id.* § 559.927(12). The Florida Amendments go beyond federal law and current Executive Branch policy by imposing additional burdens on travel to the four countries currently designated as state sponsors of terrorism and by providing additional penalties for violating federal laws related to commerce with those countries. Among other things, the Amendments:

- Require that sellers of travel to designated states post bonds of at least four times the amounts required for sellers of travel to "non-terrorist designated states." *Id.* § 559.929(1). The Amendments also impose higher registration fees, civil penalties, and administrative fines for sellers of travel to designated states as

[11] The Act explicitly exempts from its reach "[a]ny direct common carrier of passengers or property regulated by an agency of the Federal Government or employees of such carrier when engaged solely in the transportation business of the carrier as identified in the carrier's certificate." Fla. Stat. § 559.935(1)(b).

compared to such fees, penalties, and fines for sellers of travel to non-terrorist designated states. *Id*. §§ 559.928(2)(a), 559.9355, 559.936.

- Require sellers of travel to designated states to disclose all companies with whom they do business. *Id*. § 559.9285(3).

- Make any violation of "any state or federal law restricting or prohibiting commerce with terrorist states" a violation of the Act and a first degree misdemeanor under Florida law, punishable by up to one year in prison. *Id*. §§ 559.9335(23), 559.937(1), 775.082(4)(a).

- Punish violations of the Act that "directly or indirectly pertain[] to an offer to sell . . . prearranged travel, tourist-related services, or tour-guide services for individuals or groups directly to any terrorist state and which originate in Florida" as third degree felonies, punishable by up to five years in prison. *Id*. §§ 559.937(2), 775.082(3)(d).

The Florida Amendments are not a consumer protection measure. The legislative history of the Amendments does not contain any evidence that Florida consumers face a greater risk of fraud when dealing with sellers of travel to designated states than when dealing with sellers of travel to other locations. *See* Order Granting Prelim. Inj., at 9 (Oct. 10, 2008) (noting "[n]o record evidence was offered [at the preliminary injunction hearing to] suggest[] that there was any problem with travel service providers to Cuba from Florida that warranted legislative intrusion to protect the consumer public"). The Florida Amendments are instead an attempt by the State of Florida to conduct its own foreign policy. Indeed, the legislative history demonstrates that the Amendments were enacted to denounce the Cuban government and its practices. *See* Pls.' Mot. for Summ. J. and Incorporated Mem. of Law, at 31–36 (recounting anti-Cuban statements from the legislative history of the Florida Amendments); *see also* Laura Figueroa, *Area Legislators Push for Cuba Regulations*, Miami Herald, April 6, 2008, available at http://www.miamiherald.com/516/story/484870.html (last visited Mar. 18, 2009) (quoting the

sponsor of the Florida Amendments as saying "[t]hese businesses (that provide travel services to Cuba) are partners with Fidel Castro and his communist regime").

B. Procedural Background

Plaintiffs are charter companies and travel agencies that provide travel services to persons traveling from Miami to Cuba. They filed this action to challenge the constitutionality of the Florida Amendments. On July 1, 2008, the Court entered a temporary restraining order, preventing Defendant, the Commissioner of FDACS, from enforcing the Florida Amendments. The temporary restraining order was subsequently extended at the request of the parties to accommodate their suggested preliminary injunction briefing schedule.

After the parties briefed Plaintiffs' motion for a preliminary injunction, the United States filed a notice with the Court indicating it might participate in the case pursuant to 28 U.S.C. § 517. The Court granted Plaintiffs' preliminary injunction motion on October 1, 2008. The Court declined to delay a decision on the motion because it concluded "this preliminary injunction is consistent with the interest of the United States." Order Granting Prelim. Inj., at 4 n.3 (Oct. 10, 2008). In granting the preliminary injunction, the Court concluded there was a substantial likelihood that the Florida Amendments would be found unconstitutional under the foreign affairs power, the Supremacy Clause, the Foreign Commerce Clause, and the Interstate Commerce Clause. *Id*. at 25–45.

After the Court entered the preliminary injunction, the United States filed a second notice of potential participation with the Court. The notice indicated that the United States would "continue to closely monitor these proceedings and [would] consider filing a Statement of Interest at a later stage in the litigation, if deemed necessary." Second Notice by the United

States of its Potential Participation, at 1. On December 23, 2008, Plaintiffs filed a motion for summary judgment, arguing that the Florida Amendments are preempted by federal law and violate the foreign affairs power and the Foreign Commerce Clause. The motion has been fully briefed by the parties. On March 3, 2009, the Court ordered the United States to file any Statement of Interest by March 20, 2009.

ARGUMENT

I. THE FLORIDA AMENDMENTS ARE PREEMPTED BY FEDERAL LAW, THE FOREIGN AFFAIRS POWER, AND THE FOREIGN COMMERCE CLAUSE

The United States Constitution entrusts the foreign relations of our nation to the federal government in a number of ways. First, the Supremacy Clause establishes federal law as the supreme law of the land. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). It also invalidates state laws when Congress implicitly indicates an intent to occupy the field to the exclusion of other regulation. *Id*. Congressional intent to occupy a field exists where a federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where federal law touches on a field implicating such a dominant federal interest that an intent for federal law to occupy the field exclusively may be inferred. *Id*. Federal agencies acting within the bounds of their authority, as well as Congress acting directly, can preempt state laws. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153–54 (1982).

Second, multiple grants of power to Congress and the President, or denials of power to the states, found throughout the Constitution, *see* U.S. Const. art. I, §§ 8, 10; U.S. Const. art. II,

§ 2; *see also Made in the USA Found. v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001), vest the federal government with exclusive authority to conduct foreign affairs. As the Supreme Court has consistently recognized

> The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power. Our system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

See Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (quotation and footnote omitted). The foreign affairs power prevents states from enacting laws that impermissibly interfere with or impair the effective exercise of U.S. foreign policy. *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968). State laws that interfere with the exercise of foreign affairs powers must be struck down even in the absence of any affirmative federal activity in the subject area of the state law. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418 (2003); *Zschernig*, 389 U.S. at 434, 441.

Third, the Foreign Commerce Clause vests Congress with the power to "regulate Commerce with foreign Nations." U.S. Const. art 1, § 8, cl. 3. The Foreign Commerce Clause prohibits states from enacting laws that facially discriminate against foreign commerce absent a compelling justification. *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71, 81 (1992). It also prohibits states from regulating commerce in a manner that "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (quotation omitted).

In their summary judgment briefing, the parties discussed preemption, the foreign affairs power, and the Foreign Commerce Clause separately. The United States agrees with the Court's analysis of those distinct constitutional doctrines as set forth in the Court's order granting Plaintiffs' motion for preliminary injunctive relief. Because there is significant overlap between the constitutional doctrines, however, this Memorandum will address them more generally, highlighting the ways in which the Florida Amendments interfere with the federal government's conduct and control of foreign relations with regard to Cuba and the other designated states.

Crosby v. National Foreign Trade Council, 530 U.S. 363, 366 (2000), is the seminal Supreme Court case involving preemption in the field of foreign affairs. In that case, the Court invalidated a Massachusetts law that largely barred state entities from buying goods or services from companies that did business with Burma. The Court concluded the Massachusetts law violated the Supremacy Clause because it conflicted with a federal statute that regulated U.S. relations with Burma. *Id*. at 388. In reaching its decision, the Court relied on the broad discretion the federal statute delegated to the President. *Id*. at 374–76. The federal statute authorized the President to prohibit new investments by U.S. citizens in Burma and to temporarily or permanently suspend congressional sanctions against Burma. *Id*. at 374. The Court noted, "this plentitude of Executive authority . . . controls the issue of preemption" because "[i]t is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute . . . that might, if enforced, blunt the consequences of discretionary Presidential action." *Id*. at 376.

The Court in *Crosby* also relied on the carefully calibrated nature of the sanctions regime developed by Congress. *Id*. at 377–80. It determined that "Congress manifestly intended to limit economic pressure . . . to a specific range," *id*. at 377, and by providing inconsistent sanctions, the Massachusetts law "undermine[d] the congressional calibration of force," *id*. at 380. The Court observed that the Massachusetts law was at odds with the President's authority to speak for the United States with one voice in foreign affairs. *Id*. at 380. If the President decided to suspend sanctions against Burma as a reward for its progress toward improving human rights, the effect of the President's action would be lessened because Massachusetts' sanction would still be in place. *See id*. at 380–82. As the Court put it, "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Id*. at 381.

Crosby aptly demonstrates why the Florida Amendments must be struck down. Like the federal Burma statute at issue in *Crosby*, the relevant federal statutes in this case[12] delegate broad authority to the Executive Branch to manage U.S. relations with designated states. The federal statutes authorize the Executive Branch to designate, and thereby impose sanctions on, state

[12] It is irrelevant for purposes of preemption that the conflict in this case arises as a result of numerous federal statutes and regulations as opposed to a single federal statute as in *Crosby*. Indeed, the existence of numerous federal statutes and regulations makes the argument for preemption even more compelling here. State law is preempted not only when it stands as an obstacle to the achievement of federal objectives, but also when a federal regulatory scheme is so pervasive as to evidence an intent by Congress to occupy the field. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Such pervasive regulation is present in this case. As described *supra* Background, Parts I.A–B, Congress and federal agencies have created a patchwork of complex and comprehensive regulatory regimes to govern commerce with, and travel to, designated states. The extensive federal regulation of these fields leaves no room for supplementation by the states.

sponsors of terrorism, *see* 22 U.S.C. § 2780; *id*. § 2371; 50 U.S.C. App. 2405(j), to take additional country-specific actions with respect to each designated state, *see supra* Background, Part I.B, and to restrict trade with foreign nations during wartime and national emergencies, *see* 50 U.S.C. App. §§ 1–44; 50 U.S.C. §§ 1701–06. Pursuant to this delegated authority, the Executive Branch has created individualized and flexible regulatory schemes to govern transactions with designated states generally and with each of them individually, including travel to Cuba. *See* 31 C.F.R. pt. 596 (Terrorism List Governments Sanctions Regulations); 31 C.F.R. pt. 515 (Cuba); 31 C.F.R. pt. 560 (Iran); 31 C.F.R. pt. 538 (Sudan); 15 C.F.R. §§ 746.2, 746.7, 746.9 (on Cuba, Iran, and Syria, respectively); *see also* 31 C.F.R. pt. 542 (Syria).[13]

The Florida Amendments interfere with the exercise of "this plentitude of Executive authority." *Crosby*, 530 U.S. at 376; *see also Hines*, 312 U.S. at 66–67 (recognizing, in invalidating a state law requiring aliens to register, that "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations"). With respect to Cuba, for example, federal regulations impose significant restrictions on travel, but permit travel to Cuba in instances that promote the goal of a "peaceful transition to democracy" in that country or serve other foreign

[13] Defendant incorrectly asserts that "little of the federal regulatory structure touches travel agents or their role in facilitating travel to Cuba." *See* Def.'s Mem. in Opp'n to Pls.' Mot. for Summ. J., at 12. Travel service providers, including travel agents, that wish to provide travel services in connection with travel to Cuba are subject to extensive federal licensing and reporting requirements administered by OFAC. *See* 31 C.F.R. § 515.572. Travel agents are also subject to deceptive practice and unfair methods of competition oversight by DOT. *See* 49 U.S.C. § 41712; 14 C.F.R. pts. 257, 258; 14 C.F.R. §§ 399.80, 399.84.

policy interests. 68 Fed. Reg. 14141, 14143 (Mar. 24, 2003); *see* 31 C.F.R. §§ 515.561–.567. By imposing significant burdens, beyond those already imposed under federal law, on entities that provide travel services to Cuba, the Florida Amendments will limit travel that the federal government has deemed consistent with U.S. foreign policy objectives. *See Crosby*, 530 U.S. at 380 ("Sanctions are drawn not only to bar what they prohibit but to allow what they permit[.]"). As the Court observed in its preliminary injunction order, many sellers of travel to Cuba will be unable to afford the high bonding requirements and registration fees imposed by the Florida Amendments and will be forced out of the market. *See* Order Granting Prelim. Inj., at 9, 35 (Oct. 10, 2008). Others will be unwilling to continue operating while subject to the risk of severe criminal penalties that can be imposed under the Florida Amendments for even minor violations of federal law. *Id*. at 35. If these sellers of travel to Cuba are forced out of the market, there will be fewer entities to arrange and provide travel to Cuba that the federal government has authorized as consistent with U.S. foreign policy and such travel will either decrease or occur using third country entities unregulated by the federal government. The effect of the Florida Amendments on U.S. foreign policy is particularly highlighted by OFAC's recent issuance, in response to congressional legislation, of a general license permitting an expanded range of family travel to Cuba, much of which is expected to occur out of Miami. By effectively reducing the number of sellers of travel to Cuba, the Florida Amendment will limit the federal government's intended expansion of family travel. "It is simply implausible that Congress would have gone to such lengths to empower the President (to manage U.S. relations with Cuba) if it had been willing to compromise his effectiveness [by allowing Florida to] blunt the consequences of [his] action[s]" by limiting travel the federal government deemed appropriate to

encourage. *Crosby*, 530 U.S. at 376; *see Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52–53 (1st Cir. 1999) (invalidating state law that had the potential to impair U.S. relations with Burma by causing companies to withdraw from or not seek new business in Burma).

Additionally, Congress has specifically indicated that it disfavors restrictions on travel to other designated states under current sanctions by not including authority in IEEPA for the Executive Branch to regulate or prohibit transactions ordinarily incident to travel to or from any country. *See* 50 U.S.C. § 1702(b)(4). Florida's efforts to impose burdens on travel to countries under IEEPA sanctions regimes operates at odds with Congress' intent to leave such travel unencumbered.

The Florida Amendments, like the Massachusetts law at issue in *Crosby*, also interfere with federal determinations about the appropriate type of penalties to impose when violations of federal law occur. "Conflict is imminent when two separate remedies are brought to bear on the same activity." *Crosby*, 530 U.S. at 380 (quotations omitted). The Florida Amendments allow the State of Florida to impose penalties for violations of federal laws relating to commerce with designated states even when the federal government has determined that a different penalty or no penalty is the most appropriate response. For example, a travel agent that violates one of OFAC's licensing requirements is subject to prosecution for a felony under Florida law and could be imprisoned for up to five years. *See* Fla. Stat. §§ 559.937(2), 775.082(3)(d).[14] The Florida Amendments would allow the State of Florida to impose such a penalty even if OFAC

[14] Additionally, under the Florida Amendments, a violation of the federal Export Administration Regulations could subject a person to, *inter alia*, prosecution for a first degree misdemeanor and up to one year imprisonment, in addition to any penalties imposed by the federal government. *See* Fla. Stat. §§ 559.9335(23), 559.937(1), 775.082(4)(a).

determined issuance of a cautionary letter or a minimal monetary penalty was a more appropriate enforcement action in light of U.S. foreign policy objectives. By allowing Florida to impose its own penalties for the violation of federal laws relating to commerce with designated states, the Florida Amendments undermine the federal government's "calibration of force" and its judgment about the best way to enforce sanctions to achieve U.S. foreign policy objectives. *Id*. at 380; *cf. Wisconsin Dep't of Indus., Labor and Human Relations v. Gould*, 475 U.S. 282, 286 (1986) (concluding National Labor Relations Act's comprehensive nature "prevents States . . . from providing their own regulatory or judicial remedies for conduct prohibited . . . by the Act").

The agencies that administer U.S. sanctions programs for designated states are vested with substantial discretion to enforce the applicable law in a manner that is consistent with U.S. foreign policy. They consider a number of factors and balance multiple, often competing, foreign policy considerations when deciding whether and to what degree to enforce a particular violation of the regulations. OFAC, for example, considers the existence (or lack) of voluntary self-disclosure to be an important factor in determining a penalty amount for a violation of the sanctions regulations it administers. *See* 73 Fed. Reg. 51933, 51936 (Sept. 8, 2008). This factor is significant in the context of OFAC's regulation of travel service providers because OFAC's regulatory scheme is dependent on working closely with these providers; travel service providers play a crucial role in facilitating the travel that is allowed to Cuba and in serving as the first layer of protection against illegal travel. The significant criminal penalties available under Florida law for violations of federal laws governing commerce with designated states could have a chilling effect on voluntary self-disclosures made by travel service providers and thus limit the effectiveness of the considerable discretion granted to OFAC. *See Garamendi*, 539 U.S. at

423–25 (concluding a California law that compelled insurance companies to disclose information on Holocaust-era policies conflicted with the federal approach to compensating Holocaust victims, which relied on voluntary agreements with European nations); *Faculty Senate of Florida Int'l Univ. v. Roberts*, 574 F. Supp. 2d 1331, 1350, 1353 (S.D. Fl. 2008) (invalidating a Florida law that prohibited state universities from spending non-state funds on activities related to travel to designated states because it "pull[ed] levers of influence" that federal law did not and impaired the federal government's "ability . . . to choose between a range of policy options in developing its foreign relations with [designated states]").

Finally, the very existence of the Florida Amendments diminishes the flexibility provided by the relevant federal statutes and impairs the federal government's ability to present a single, unified foreign policy on behalf of the United States when dealing with other countries. Flexibility is an indispensable tool in conducting foreign policy; it permits the federal government to respond quickly to new international developments and adapt to changing foreign policy goals. *See Regan*, 468 U.S. at 243 (observing that the CACR have been "alternately loosened and tightened in response to specific circumstances[] ever since" they were first promulgated during the Kennedy Administration). Indeed, just last week Congress legislated particular adjustments to the travel restrictions pertaining to Cuba, showing that federal law with respect to designated states continues to evolve. Although Congress has precluded a full lifting of the embargo against Cuba before a democratic transition, and some legislation mandates discrete aspects of the embargo, Congress has left the President with a great deal of discretion to adjust the terms of the embargo. The power of this carrot is significantly lessened by the Florida Amendments. If the President were to decide to loosen restrictions on travel to Cuba, the

burdens imposed on such travel by the Florida Amendments would remain in force absent additional state legislation. "Quite simply, if the [Florida Amendments are] enforceable the President has less to offer and less economic and diplomatic leverage as a consequence." *Crosby*, 530 U.S. at 377. The federal government's power would be further weakened if other states followed Florida's lead by imposing their own restrictions and penalties for travel to designated states.[15]

The State of Florida enacted the Florida Amendments in an attempt to conduct its own foreign policy. *See supra* Background, Part II.A. The Amendments go beyond federal law and current Executive Branch policy by imposing additional burdens on travel to designated states and providing additional penalties for violating federal laws related to commerce with those countries. The Amendments also facially discriminate against foreign commerce by imposing burdens on sellers of travel to designated states that they do not impose on sellers of travel to other locations. *See supra* Background, Part II.A; *see also Kraft Gen. Foods*, 505 U.S. at 80 (concluding Iowa tax law discriminated against foreign commerce because it "impose[d] a burden on foreign subsidiaries that it [did] not impose on domestic subsidiaries"); *Natsios*, 181 F.3d at 67 ("Supreme Court decisions under the Foreign Commerce Clause have made it clear that state laws that are designed to limit trade with a specific foreign nation are precisely one type of law that the Foreign Commerce Clause is designed to prevent."). By doing so, the

---

[15] The Florida Amendments do not avoid conflict preemption by linking their additional burdens to federal government designations of state sponsors of terrorism. The federal government's ability to impose or lift sanctions against foreign countries is not limited to its ability to designate state sponsors of terrorism. *See supra* Background, Part I.B. Therefore, a change in U.S. foreign policy toward a particular designated state would not necessarily be automatically reflected in the Florida Amendments.

Florida Amendments impermissibly interfere with foreign affairs and foreign commerce powers reserved exclusively by our Constitution to the federal government. They also frustrate the objectives of federal legislation granting the President broad authority and flexible tools to manage U.S. relations with designated states. For these reasons, the Florida Amendments are preempted by federal law, the foreign affairs power, and the Foreign Commerce Clause.

II. THE FLORIDA AMENDMENTS ARE EXPRESSLY PREEMPTED BY THE AIRLINE DEREGULATION ACT ("ADA") INSOFAR AS THEY REGULATE PUBLIC CHARTER OPERATORS

Congress enacted the ADA in 1978 to loosen federal regulation of the airline industry, and thus, "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." H.R. Conf. Rep. No. 95-1779, at 53 (1978); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1343 (11th Cir. 2005). "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S. at 378, Congress included an express preemption provision in the ADA that prohibits states from enacting or enforcing any law or regulation "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).[16]

[16] The ADA's preemption provision originally applied to any state law or regulation "relating to rates, routes, or services" of any air carrier. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378–79 (1992). Congress revised this language to its current form in 1994, but the revision was not intended to effectuate a substantive change. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995). Indeed, the Supreme Court recently reaffirmed the broad interpretation of the ADA set forth in *Morales*. *See Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 994–96 (2008).

The ADA's preemption provision is interpreted broadly. *Morales*, 504 U.S. at 383. It preempts any state regulation that has a connection with or reference to rates, routes, or services of an air carrier. *Id*. at 383–84 (citing Black's Law Dictionary's definition of "relating to" as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"). The preemption provision applies even to laws of general applicability and those laws that have only an indirect effect on the rates, routes, or services of air carriers. *Id*. at 385–86; *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1255 (11th Cir. 2003) (observing that the ADA preempts state laws that have a forbidden effect on an air carrier's prices, routes, or services).

Several of the plaintiffs in this case are air carriers within the meaning of the ADA's preemption provision. An "air carrier" is "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). This definition includes both direct air carriers (*i.e.*, carriers that operate aircraft) and indirect air carriers (*i.e.*, entities that offer transportation services to potential passengers and then contract with underlying aircraft operators to provide the actual transportation).[17] *See* 14 C.F.R. § 380.2. Public charter operators are indirect air carriers; they offer transportation services to potential passengers and contract with direct air carriers to provide that transportation. *See id*. Five of the

[17] The statutory definition of "air carrier" does not encompass ticket agents or travel agents, who sell tickets for seats offered by a direct or indirect air carrier. *See* 49 U.S.C. § 40102(a)(45) (defining "ticket agent" to specifically exclude air carriers).

plaintiffs in this case are currently approved by DOT as public charter operators to provide air transportation between Florida and Cuba.[18]

The Florida Amendments' regulation of plaintiffs who are indirect air carriers has a connection with or effect on the rates, routes, or services offered by those plaintiffs, and thus, is expressly preempted by the ADA.[19] As this Court observed in its preliminary injunction order, the increased bonding and disclosure requirements, and the severe civil, administrative, and criminal penalties, provided for in the Florida Amendments will likely result in the provision of fewer air carrier services to Cuba at higher rates. *See* Order Granting Prelim. Inj., at 35 (Oct. 10, 2008). The requirements and the potential for imposition of penalties may force some indirect air carrier plaintiffs out of the market. Others may remain in business but pass the increased costs of operation on to customers in the form of higher prices. Such interference with air carrier rates and services is not permitted under the ADA. *See Rowe v. New Hampshire Motor Transp.*

---

[18] The approved indirect air carrier plaintiffs are ABC Charters, Inc.; Marazul Charters, Inc.; Xael Charters, Inc.; Wilson International Services, Inc.; and Cuba Travel Services, Inc. The United States expresses no position regarding whether the Florida Amendments are expressly preempted by the ADA insofar as they apply to the plaintiffs that are not approved by DOT as public charter operators.

[19] Defendant relies on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), to argue that preemption cannot be implied, as discussed *supra* Argument, Part I, if the Florida Amendments are not expressly preempted by the ADA. *See* Def.'s Mem. in Opp'n to Pls.' Mot. for Summ. J., at 3, 7, 12 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.")). The Supreme Court, however, has subsequently clarified that *Cipollone* did not announce a categorical rule precluding the coexistence of express and implied preemption. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–88 (1995); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 869–70 (2000) (concluding express preemption provision does not bar consideration of implied preemption principles). In any event, preemption of the Florida Amendment's under the express preemption provision of the ADA has no bearing on whether the Amendments are also implicitly preempted because they conflict with different federal statutes and impair the effective exercise of U.S. foreign policy.

Ass'n, 128 S. Ct. 989, 996 (2008) (concluding a state law that effectively required motor carriers to provide tobacco delivery services that were different from those that the market alone might dictate was preempted by a similar preemption provision); *Morales*, 504 U.S. at 390 (holding application of states' deceptive practices laws to airline advertising was preempted by the ADA because the laws "would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge").

Defendant contends that the Florida Amendments will not affect air carriers because the Act does not apply to public charter operators. *See* Def.'s Mem. in Opp'n to Pls.' Mot. for Summ. J., at 5 n.2, 7. In support of this assertion, Defendant points out that the Act expressly excludes from its reach "[a]ny direct common carrier of passengers or property regulated by an agency of the Federal Government . . . when engaged solely in the transportation business of the carrier as identified in the carrier's certificate." Fla. Stat. § 559.935(1)(b). As noted above, however, the ADA preempts state regulation of the prices, routes, or services offered by any air carrier, including both direct air carriers and indirect air carriers. The indirect air carrier plaintiffs are not direct common carriers of passengers; they are public charter operators who contract with direct air carriers to provide transportation. As such, the indirect air carrier plaintiffs are subject to the requirements of the Amendments. *See* Fl. Stat. § 559.927(11) (defining "seller of travel"). Because the Florida Amendments regulate the indirect air carrier plaintiffs in a manner that has a connection with or effect on the rates, routes, or services of those plaintiffs, the Amendments are expressly preempted by the ADA.[20]

---

[20] Even if the Florida Amendments' regulation of the indirect air carrier plaintiffs was not expressly preempted by the ADA, it still would be impliedly preempted by that statute pursuant (continued...)

CONCLUSION

For the foregoing reasons, the United States respectfully asserts that the Florida Amendments are preempted by federal law, the foreign affairs power, and the Foreign Commerce Clause.

---

[20](...continued)
to principles of field and conflict preemption. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 868–69, 874 (2000) (invalidating a state tort law under conflict preemption principles even though the state law was not preempted by an express preemption provision); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (explaining the different types of preemption). DOT extensively regulates public charter operators. *See* 14 C.F.R. pt. 380 (addressing licensing, bonding, escrow arrangements, and the scope of permissible advertising). This comprehensive regulation, carried out pursuant to Congressional authorization, evidences an intent to occupy the field and thus precludes state supplementation.

Additionally, the ADA was enacted to deregulate the airline industry. *See Morales,* 504 U.S. at 378. Permitting Florida to impose its own bonding and disclosure requirements on certain air carriers would frustrate this objective. *See Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S. Ct. 989, 996 (2008) (observing, in the context of a similar statute deregulating trucking, that "to interpret the [federal preemption provision] to permit [differing] state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations" contrary to the purpose of the federal statute). Thus, the Florida Amendments are also precluded by conflict preemption.

Respectfully submitted this 20th day of March, 2009.

MICHAEL F. HERTZ
Acting Assistant Attorney General

R. ALEXANDER ACOSTA
United States Attorney

SANDRA M. SCHRAIBMAN (Fla. Bar # 0206873)
Assistant Director, Federal Programs Branch

s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney (Spec. Fla. Bar #A5501297)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7111
Washington, D.C. 20001
Tel: (202) 305-8902
Fax: (202) 616-8470
Email: michelle.bennett@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on March 20, 2009 on all counsel and parties of record on the attached service list.

s/ Michelle R. Bennett
Michelle R. Bennett

SERVICE LIST

ABC Charters, Inc., et al., vs. Charles H. Bronson
Case No. 08-21865-Civ (Gold/McAliley)
United States District Court, Southern District of Florida

Ira J. Kurzban, Esq.
ira@kkwtlaw.com
Kurzban, Kurzban, Weinger and Tetzeli, P.A.
2650 Southwest 27th Ave., Second Floor
Miami, FL 33133
Telephone: (305) 444-0060
Facsimile: (305) 444-3503
Attorney for Plaintiffs ABC Charters, Inc., et al.

Steven M. Weinger, Esq.
swmiami@aol.com
Kurzban, Kurzban, Weinger and Tetzeli, P.A.
2650 Southwest 27th Ave., Second Floor
Miami, FL 33133
Telephone: (305) 444-0060
Facsimile: (305) 444-3503
Attorney for Plaintiffs ABC Charters, Inc., et al.

Helena M. Tetzeli, Esq.
helena@kkwtlaw.com
Kurzban, Kurzban, Weinger and Tetzeli, P.A.
2650 Southwest 27th Ave., Second Floor
Miami, FL 33133
Telephone: (305) 444-0060
Facsimile: (305) 444-3503
Attorney for Plaintiffs ABC Charters, Inc., et al.

Jonathan A. Glogau, Esq.
jon.glogau@myfloridalegal.com
Attorney General Office
The Capitol PL-01
Tallahassee , FL 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-6589
Attorney for Defendant Charles H. Bronson

Eric H. Miller, Esq.
millere1@doacs.state.fl.us
Dept. of Agriculture and Consumer Services
2005 Apalachee Parkway
Tallahassee, FL 32301
Telephone: (850) 410-3775
Facsimile: (850) 410-3797
Attorney for Defendant Charles H. Bronson

Louis E. Stolba, Esq.
stolbal@doacs.state.fl.us
Dep't of Agriculture & Consumer Services
2005 Apalachee Parkway
Tallahassee , FL 32301
Telephone: (850) 410-3701
Fax: (850) 410-3797
Attorney for Defendant Charles H. Bronson

Raymond C. Conklin, Esq.
conklin@doacs.state.fl.us
Dep't of Agriculture & Consumer Services
2005 Apalachee Parkway
Tallahassee , FL 32301
Telephone: (850) 410-3701
Fax: (850) 410-3797
Attorney for Defendant Charles H. Bronson

Leonard M. Collins, Esq.
leonard.collins@myfloridahouse.gov
Florida House of Representatives
515 The Capitol
402 S. Monroe Street
Tallahassee, FL 32399-1300
Telephone: (850) 413-8949
Facsimile: (850) 488-1506
Attorney for The Florida House

Jeremiah M. Hawkes, Esq.
jeremiah.hawkes@myfloridahouse.gov
General Counsel
Florida House of Representatives
422 The Capitol
402 S. Monroe Street
Tallahassee, FL 32399-1300
Telephone: (850) 488-7631
Facsimile: (850) 488-0376
Attorney for The Florida House

Catherine M. Rodriguez, Esq.
cmrodriguezpa@bellsouth.net
Levey, Filler, Rodriguez, Kelso & De Bianchi, LLP
Plaza Venetia
555 NE 15th Street, Suite 104
Miami, FL 33132
Telephone: (305) 371-5250
Facsimile: (305) 371-5752
Attorney for ASTA

Daniel R. Zim, Esq.
dzim@asta.org
American Society of Travel Agents, Inc.
1101 King Street, Suite 200
Alexandria, VA 22314
Telephone: (703) 739-2782
Facsimile: (703) 684-9185
Attorney for ASTA

Paul M. Ruden, Esq.
pruden@asta.org
American Society of Travel Agents, Inc.
1101 King Street, Suite 200
Alexandria, VA 22314
Telephone: (703) 739-2782
Facsimile: (703) 684-9185
Attorney for ASTA

Michelle R. Bennett, Esq.
michelle.bennett@usdoj.gov
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7111
Washington, D.C. 20001
Telephone: (202) 305-8902
Facsimile: (202) 616-8470
Attorney for the United States of America